UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROCKWELL BURR SIGN & DESIGN, INC., d/b/a BURR SIGNS,	)	
Plaintiff	)	
v.	)	***Docket No. 02-222-P-H***
GULF INSURANCE COMPANY,	)	
Defendant/Third-Party Plaintiff	)	
v.	)	
PHOENIX CORPORATION,	)	
Third-Party Defendant	)	

MEMORANDUM DECISION ON MOTIONS TO STRIKE AND RECOMMENDED DECISION ON MOTION OF GULF INSURANCE COMPANY FOR SUMMARY JUDGMENT

The defendant and third-party plaintiff, Gulf Insurance Company ("Gulf"), moves for summary judgment on the claims made against it by the plaintiff, Rockwell Burr Sign & Design, Inc. ("Burr").[1] In its response to the statement of material facts filed by Gulf in support of its motion, as required by this court's Local Rule 56, the plaintiff includes motions to strike several individual paragraphs of Gulf's statement of material facts, on various grounds. Gulf has also objected to several of the citations given by Burr in its

[1] Default has been entered on the claims of Gulf Insurance Company against Phoenix Corporation. Docket No. 9.

qualifications and denials of certain paragraphs in Gulf's statement of material facts. I grant the motion to strike in part and rule on the objections. I recommend that the court grant the motion for summary judgment.

I. Motion to Strike

Burr has moved to strike the following paragraphs of Gulf's statement of material facts on the grounds that no citations to the record are given in support of the paragraphs and that they present conclusions of law rather than factual assertions: 44, 46, 51, 53, 60, 65, 68, 74, 78 and the final sentences of 79 and 89. Plaintiff's Opposing Statement of Material Facts, etc. ("Plaintiff's Responsive SMF") (Docket No. 20) at 8-15, 17. For most of the paragraphs at issue, Gulf responds that the motion to strike is "groundless" and points out other paragraphs of its statement of material facts that include references to the summary judgment record which it asserts support the assertion in the challenged paragraph. Reply of Defendant/Third Party Plaintiff Gulf Insurance Company to Plaintiff's Opposing Statement of Material Facts, etc. ("Defendant's Responsive SMF") (Docket No. 24) ¶¶ 44, 51, 53, 60, 65, 74. For three of the remaining paragraphs, Gulf also asserts that the motion to strike is groundless and points out that it did provide a citation to the summary judgment record. *Id*. ¶¶ 68, 78, 89. With respect to paragraph 46, Gulf also characterizes the motion to strike as "groundless," although it merely argues that Burr "does not dispute" the assertions in the paragraph. Of course, a party that moves to strike a paragraph included in a statement of material facts need not deny the assertions as well. In any event, it is clear that each of the paragraphs challenged by Burr as stating a legal conclusion rather than asserting a fact does in fact sate a

legal conclusion, and the motion to strike is granted for that reason. A statement of material facts is just that; argument and legal conclusions should appear only in a party's memoranda of law.[2]

Burr also moves to strike the following paragraphs of Gulf's statement of material facts on the grounds that they state legal conclusions: 48, 50, 80 and 81. Plaintiff's Responsive SMF at 9-10, 15-16. Gulf again responds that the motions are "groundless." Defendant's Responsive SMF ¶¶ 48, 50, 80, 81. Again, the paragraphs at issue do present conclusions rather than factual assertions and the motion to strike them is accordingly granted.

Finally, Gulf has objected to Burr's reliance on paragraphs 16, 17 and 20 of the affidavit of Randolph Burr in certain paragraphs of its responsive statement of material facts and statement of additional material facts. Defendant's Responsive SMF ¶¶ 14, 20, 26, 27, 43, 49, 52, 55-58, 69-73 and 11-12.[3] It contends that Burr is without personal knowledge of the matters asserted in those paragraphs of his affidavit. The paragraphs of the affidavit at issue provide as follows:

> 16. At no time was Phoenix's insurer, Gulf Insurance Company ("Gulf"), excluded from the settlement process. In fact, through my attorney, I invited the participation of Gulf at an early stage of the Underlying Action, and remained willing to negotiate with Gulf at all states of the lawsuit. In response Gulf indicated that it was not providing a defense for Phoenix.

[2] Insofar as statements of fact are concerned, counsel for Gulf is reminded that compliance with this court's Local Rule 56(b) is not optional. Each numbered paragraph in a statement of material facts must include a citation to the summary judgment record, and a belated attempt to supply missing citations after a motion to strike has been filed will not suffice. The party opposing summary judgment is entitled to know the record authority on which the moving party relies with respect to each paragraph of its statement of material facts before it is required to respond to the motion and the statement of material facts. Gulf's practice in this case deprives Burr of that basic opportunity and cannot be condoned, no matter how obvious it may appear to counsel for Gulf that there is support in the summary judgment record for those paragraphs for which no citations were provided.

[3] The latter two citations are to Gulf's responses to Burr's statement of additional facts, Statement of Additional Material Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF, beginning at p. 17), which Burr numbered starting with 1 rather than consecutively to its responses to the paragraphs of Gulf's initial statement of material facts.

> 17. To my knowledge, Gulf Insurance Company never offered to participate in the settlement negotiations with Burr Signs.
>
> * * *
>
> 20. Phoenix Corporation has not made the payments called for under the Settlement Agreement, and has breached the Agreement. As a result of that breach, it is my understanding that Phoenix is obligated to Burr Signs for the full amount of the judgment. Accordingly, Burr Signs has perfected liens against Phoenix Corporation for the full amount of the judgment, and is actively pursuing the collection of that Judgment.

Affidavit of Randolph Burr (Docket No. 22) ¶¶ 16-17, 20. The affidavit also states that Randolph Burr is the president of the plaintiff, has its business records within his custody and control and derives his statements in the affidavit from personal knowledge and the records, unless otherwise expressly stated. *Id*. ¶¶ 1, 4, 5. No other source is stated in the challenged paragraphs. While Mr. Burr's statements in the challenged paragraphs are somewhat conclusory, it is possible that paragraphs 16 and 17 are based on his personal knowledge, as required by Fed. R. Civ. P. 56(e). The court can and will evaluate those conclusions in the light of other evidence in the summary judgment record. The first and second sentences of paragraph 20 of the affidavit present legal conclusions, which will be disregarded by the court.

II. Summary Judgment Motion

A. Applicable Legal Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

After resolution of the objection and motions to strike discussed above, the following undisputed material facts are properly presented and supported in the parties' respective statements of material facts.

Burr is a Maine corporation with a principal place of business in South Portland, Maine. Defendant's SMF ¶ 10; Plaintiff's Responsive SMF ¶ 10. Gulf is an insurance company incorporated under the laws of Connecticut with a principal place of business in New York, New York. *Id*. ¶ 1. Phoenix Corporation, the third-party defendant, is a Kansas corporation with a principal place of business in Ottawa, Kansas. *Id*. ¶ 2. Phoenix is in the business of designing, manufacturing, selling, installing and servicing truck-mounted cranes. *Id*. On or about June 27, 2000 Gulf issued to Phoenix a commercial general liability insurance policy, policy number GA 0498194 (the "gulf policy"). *Id*. ¶ 3. Phoenix is the named insured under the Gulf policy, which has a policy period of May 4, 2000 to May 4, 2001. *Id*. The

Gulf policy is subject to a self-insured retention of $50,000 per occurrence, with limits of liability of $1 million for each occurrence and $2 million in the aggregate, in excess of the self-insured retention. *Id*. The Gulf policy was underwritten in Hartford, Connecticut; issued there to Phoenix's broker in New York City; and eventually delivered to Phoenix in Ottawa, Kansas. *Id*. ¶ 4.

By letter dated December 14, 2000 an attorney for Burr submitted to Phoenix a notice of claim arising from an incident which had allegedly occurred on October 11, 2000 and in which a Phoenix Skyhoist Crane Model SX57, Serial Number SX57-6358-97 ("the crane"), collapsed in Windham, Maine, resulting in personal injuries and property damage and consequent losses. *Id*. ¶ 5. On or about December 22, 2000 Gulf received a copy of that notice of claim from counsel for Phoenix. *Id*. On or about June 4, 2001 Burr filed an action against Phoenix in this court, which was assigned civil docket number 01-150-P-H ("the underlying case"). *Id*. ¶ 6. The complaint alleged, *inter alia*, that the crane, which had been manufactured by Phoenix, purchased by Burr from Phoenix in 1997 and installed by Phoenix on Burr's truck, had collapsed on October 11, 2000, causing personal injuries to one of Burr's employees and damage to its property. *Id*. On or about June 12, 2001 Karen E. Lyons of Gulf received a copy of the complaint in the underlying case from counsel for Phoenix. *Id*. ¶ 11. Lyons is the claim representative responsible for managing claims made and suits brought against Phoenix under the Gulf policy. *Id*.

By letter dated June 13, 2001 Gulf acknowledged receipt of a copy of the complaint. *Id*. ¶ 12. The letter stated, in part:

> Neither this correspondence nor any prior or future communication or investigation with respect to the above-captioned matter, of course, should be construed as a waiver of any defenses available to Gulf, including but not limited to rights or defenses provided under the Gulf Policy, or any other applicable contract of insurance.

Id. Damages sought by Burr in the underlying case included alleged costs of mitigating the damages allegedly resulting from the collapse of the crane, replacement costs, lost profits due to business interruption and loss of future business. *Id*. ¶ 13. On or about March 27, 2001 counsel for Burr conveyed a settlement offer of $65,000 to Phoenix and Gulf. Plaintiff's SMF ¶ 8; Defendant's Responsive SMF ¶ 8.

By letter of January 3, 2002 to Phoenix's attorney, Gulf requested a pre-trial report on the underlying case. Defendant's SMF ¶ 14; Plaintiff's Responsive SMF ¶ 14. Specifically, Gulf requested a description of the occurrence, information about Burr, special damages, liability, verdict potential, estimated length of trial and costs, status of settlement negotiations (including last demand and last offer) and strategy recommendations. *Id*. On or about January 14, 2002 Gulf received a letter of the same date from Phoenix's counsel who advised that Phoenix was "attempting to negotiate a settlement of the case." *Id*. ¶ 15.

In a letter dated January 30, 2002 to Phoenix's counsel, Lyons made the following request:

> I specifically need to know what your strategy is to effectuate a settlement on behalf of Phoenix Corporation, this would include the settlement ranges and the amount of any offers made to date. In addition, I need to know what payments have been made that erode the $50,000 S[elf-]I[nsured] R[etention], and the balance available to fund any settlement.

Id. ¶ 16. Gulf did not receive a response to this letter. *Id*. ¶ 17. By letter dated March 7, 2002 Gulf again requested the information requested in the letters of January 3 and January 30, 2002. *Id*. ¶ 18. Gulf did not receive a response to this letter. *Id*. ¶ 19. During the period from January 2002 through April 2002, the parties to the underlying case were actively pursuing settlement. *Id*. ¶ 20.

The underlying case was resolved by settlement and was not tried. *Id*. ¶ 21. Counsel for Phoenix in the underlying case negotiated the settlement with counsel for Burr in the underlying case. *Id*. On or about April 22, 2002 the parties to the underlying case entered into a written settlement agreement. *Id*. ¶

22. In accordance with the terms of the settlement agreement, on or about April 24, 2002 Burr executed a covenant not to sue Phoenix for any act, omission or cause of action that could have been brought in the underlying case or to "enforce any and all liability with regard to the judgment entered into [in] the [underlying case] against Phoenix Corporation in the amount of $121,500." *Id*. ¶¶ 23, 45. Also in accordance with the settlement agreement, on or about April 25, 2002 the parties to the underlying case entered into an agreement for judgment in favor of Burr in the amount of $121,500. *Id*. ¶ 24. As part of the settlement agreement, Phoenix agreed to pay $35,000 to Burr and its insurer. *Id*. ¶ 25. Phoenix has not paid any part of the $35,000. *Id*.

Gulf did not participate in any of the settlement negotiations in the underlying case, did not authorize or agree to the settlement and was not a party to the agreement by which the underlying case was settled. *Id*. ¶ 26.[4] Gulf was not informed of the fact or terms of the settlement until after it had been entered into. *Id*. Gulf had no prior knowledge of the agreement for judgment that was made in connection with the underlying case and was not aware of Phoenix's decision to enter into it until after Phoenix had done so. *Id.* ¶ 27.[5] Gulf did not at any time agree to a settlement or sign a release of liability in connection with the underlying case. *Id*. ¶ 28.

On April 30, 2002 this court entered judgment for Burr in the underlying action in the amount of $121,500. *Id*. ¶ 29. Burr delivered notice of the judgment to Gulf. Plaintiff's SMF ¶ 15; Defendant's

[4] Burr purports to deny this paragraph of Gulf's statement of material facts, Plaintiff's Responsive SMF ¶ 26, but its denial does not address any of the facts asserted by Gulf. Because those assertions are supported by the reference to the summary judgment record given by Gulf in support of that paragraph of its statement of material facts, they are deemed admitted. Local Rule 56(e).

[5] See footnote 3, above.

Responsive SMF ¶ 15. The only portion of the $50,000 self-insured retention paid by Phoenix is $1,500 in legal fees in the underlying action. Defendant's SMF ¶ 30; Plaintiff's Responsive SMF ¶ 30.[6]

C. Discussion

The complaint presents, in a single count, a claim under 24-A M.R.S.A. § 2904. Complaint and Demand for Jury Trial ("Complaint") (Docket No. 1) ¶ 21. That statute provides, in pertinent part:

> Whenever any person . . . recovers a final judgment against any other person for any loss or damage specified in section 2903, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a civil action, in his own name, against the insurer to reach and apply the insurance money, if when the right of action accrued, the judgment debtor was insured against such liability and if before the recovery of the judgment the insurer had had notice of such accident, injury or damage.

24-A M.R.S.A. § 2904. The defendant contends that this statute is not applicable to the Gulf policy because it was neither issued nor delivered in Maine. Memorandum of Defendant/Third-Party Plaintiff Gulf Insurance Company in Support of Its Motion for Summary Judgment ("Motion") (Docket No. 14) at 6-8. I agree. Section 2904 is part of Chapter 39 of Title 24-A of the Maine Revised Statutes Annotated. The first section of Chapter 39 provides:

> All contracts of casualty insurance delivered or issued for delivery in this State and covering subjects resident, located, or to be performed in this State are also subject to the applicable provisions of chapter 27 (the insurance contract) and to other applicable provisions of this Title.

24-A M.R.S.A. § 2901. Chapter 27 of Title 24-A applied to all insurance contracts other than, *inter alia*, "policies or contracts not issued for delivery in this State nor delivered in this State." 24-A M.R.S.A. § 2401(2). The Gulf policy was not issued in Maine, issued for delivery in Maine, or delivered in Maine. Defendant's SMF ¶ 4; Plaintiff's Responsive SMF ¶ 4. The provisions of the Maine Insurance Code do

[6] See footnote 3, above.

not apply to the Gulf policy. *Security Ins. Group v. Emery*, 272 A.2d 736, 738 (Me. 1971); *Libby v. Transamerica Occidental Life Ins. Co.*, 737 F. Supp. 114, 116 (D. Me. 1990). Ordinarily, that should be the end of the matter.

Burr, however, contends that, if the statute it invoked is not applicable, it is nonetheless entitled to proceed directly against Gulf, citing a Connecticut statute, section 38a-321 of the Connecticut General Statutes Annotated. Plaintiff's Objection to Motion of Defendant/Third-Party Plaintiff Gulf Insurance Company for Summary Judgment ("Opposition") (Docket No. 19) at 6-7. Gulf does not object to this *de facto* amendment of the complaint, but rather reiterates its arguments on the merits of Burr's claim. Reply Memorandum of Defendant/Third-Party Plaintiff Gulf Insurance Company in Support of Its Motion for Summary Judgment ("Reply") (Docket No. 23). Accordingly, I will consider the merits as if the complaint had been appropriately amended. *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 n.1 (1st Cir. 2000).

The Connecticut statute invoked by Burr provides:

> Each insurance company which issues a policy to any . . . corporation, insuring against loss or damages on account of the bodily injury or death by accident of any person, or damage to the property of any person, for which loss or damage such . . . corporation is legally responsible, shall, whenever a loss occurs under such policy, become absolutely liable, and the payment of such loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, damage or death caused by such casualty. . . . Upon the recovery of a final judgment against any . . . corporation by any person . . . for loss or damage on account of bodily injury or death or damage to property, if the defendant in such action was insured against such loss or damage at the time when the right of action arose and if such judgment is not satisfied within thirty days after the date when it was rendered, such judgment creditor shall be subrogated to all the rights of the defendant and shall have a right of action against the insurer to the same extent that the defendant in such action could have enforced his claim against such insurer had such defendant paid such judgment.

Conn.Gen.Stat.Ann. § 38a-321. Under this statute, a party subrogated to the rights of the insured has no different or greater rights against the insurer than the insured possesses and is equally subject to any defense the insurer may have against the insured under the policy. *DaCruz v. State Farm Fire & Cas. Co.*, 794 A.2d 1117, 1121 (Conn.App. 2002).[7]

Here, Gulf first contends that the agreed settlement does not constitute a loss covered by the policy because it was not established by adjudication, arbitration or a compromise settlement to which Gulf had previously agreed in writing, as required by the terms of the Gulf policy. Motion at 8-9. Gulf relies in this regard on three sections of the Gulf policy. *Id*. at 9, 11. The first provides:

> We will pay those sums "you" become legally obligated to pay as "ultimate net loss" in excess of the "self insured retention" as set forth below, because of "bodily injury" or "property damage" to which this insurance applies.

Defendant's SMF ¶ 34; Plaintiff's Responsive SMF ¶ 34. The term "you" is defined in the Gulf policy as the named insured, *id*. ¶ 35, which in this case is Phoenix, *id*. ¶ 36. The second section of the policy on which Gulf relies is the definition of the term "ultimate net loss" as

> those sums for "damages" which "you" are legally liable in payment of "bodily injury," "property damage," "personal injury" or "advertising injury." "Ultimate net loss" may be established by adjudication, arbitration, or a compromise settlement to which we have previously agreed in writing . . . .

Id. ¶ 38. The third section of the policy on which Gulf relies provides that:

> No person or organization has a right under this Coverage Part:
>
> * * *
>
> To sue us on this Coverage Part unless all of its terms have been complied with.

[7] Gulf refers in passing to the fact that Kansas law does not allow direct actions against insurers by third parties. Motion at 7-8. If Kansas law were to apply, Gulf would be entitled to summary judgment. *White v. Goodville Mut. Cas. Co.*, 596 P.2d 1229, 1233 (Kan. 1979); *King v. American Family Ins. Co*., 874 P.2d 691, 694 (Kan.App. 1994). It is not necessary to determine whether Connecticut or Kansas law applies (neither of the parties mentions the possibility that Maine common law might appropriately be applied in this case) because, as discussed below, Gulf is entitled to summary judgment under Connecticut law as well.

> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

Id. ¶ 47. Because the underlying action was resolved by a settlement to which Gulf did not give written approval, it contends that the settlement is not covered by the policy.

Burr first responds that the policy language barring recovery in the absence of a final judgment obtained after an actual trial "has been legislatively voided," apparently because "[n]either Maine nor the [sic] Connecticut law requires an 'actual trial' before the rights of a claimant under a judgment are perfected as against a defendant's insurer." Opposition at 7. To the contrary, both statutes merely use the term "final judgment," a term that is not inherently inconsistent with the terms of the Gulf policy. The only authority cited by Burr in support of this argument, *id*. at 7-8, is *Home Ins. Co. v. Aetna Life & Cas. Co.*, 644 A.2d 933, 935 (Conn.App. 1994), a decision that was overturned by the Connecticut Supreme Court, 663 A.2d 1001 (Conn. 1995), and which in any event does not address the substance of Burr's argument in any way. It is not necessary to parse the meaning of "adjudication" in the Gulf policy any further, because it is undisputed that the judgment entered in the underlying action at issue in this case resulted from a settlement to which Gulf had not previously agreed in writing. Burr cannot avoid this requirement of the policy language merely by having the settlement reduced to a consent judgment. The judgment creditor is, after all, subrogated only "to all the rights of the defendant" in the underlying action under the Connecticut statute, and nothing more. Conn. Gen. Stat. Ann. § 38a-321.

Burr contends that Gulf is required to satisfy the judgment despite the fact that it did not sign the settlement agreement because it failed to defend Phoenix in the underlying action. Opposition at 9-11.

However, all of the case law cited by Burr in support of this argument — none of which involves Connecticut law — is distinguishable, because the insurers in those cases had a duty to defend their insureds in the underlying action or were defending the underlying action under a reservation of rights. *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1200 (5th Cir. 1986) (Texas law); *Insurance Co. of N. Am. v. Spangler*, 881 F. Supp. 539, 544 (D. Wyo. 1995) (Wyoming law); *Cambridge Mut. Fire Ins. Co. v. Perry*, 692 A.2d 1388, 1390-91 (Me. 1997); *United Servs. Auto. Ass'n v. Morris*, 741 P.2d 246, 249 (Ariz. 1987) (Arizona law); *Miller v. Shugart*, 316 N.W.2d 729, 733 (Minn. 1982) (Minnesota law). Here, Burr has not offered any evidence that Gulf issued a reservation of rights with respect to the underlying action.[8] It is clear that Gulf had no duty to defend Phoenix under the terms of the Gulf policy. Defendant's SMF ¶ 67; Plaintiff's Responsive SMF ¶ 67. *See QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 915 (Conn. 2001) (duty to defend derives from insurance contract). Burr suggests that Gulf nonetheless may not rely on the fact that it did not sign the settlement agreement because it did not "attempt[] to contact Phoenix's counsel by telephone, or [make] any attempt to have contacted [sic] Phoenix's local counsel," "does not even set forth facts tending to establish that it investigated the claim," and "never contacted Burr Signs with respect to settlement negotiations." Opposition at 11. It understandably cites no authority in support of this argument, since the Gulf policy does not require Gulf to do any of these things. Gulf did attempt to keep itself informed about the status of settlement negotiations

[8] If Burr had offered such evidence, the outcome would be the same because this court has held that, even in cases in which an insurer issues a reservation of rights, the standard cooperation clause in insurance contracts, like the one included in the Gulf policy, Defendant's SMF ¶ 54; Plaintiff's Responsive SMF ¶ 54, requires the insured to obtain the consent of the insurer to any settlement in order for the judgment creditor seeking to enforce the settlement to recover under the insurance policy, whether or not prejudice to the insurer is shown. *Gates Formed Fibre Prods., Inc. v. Imperial Cas. & Indem. Co.*, 702 F. Supp. 343, 346-48 (D. Me. 1988). Contrary to Burr's assertion, Opposition at 11, nothing in *Marquis v. Farm Family Ins. Co.*, 628 A.2d 644, 650 (Me. 1993), requires modification of the holding in *Gates*. The question appears to be unresolved in Connecticut law, but nothing in the language of the Connecticut statute at issue suggests that the analysis or outcome should be any different.

but Phoenix, its insured, failed to respond to Gulf's repeated requests. Defendant's SMF ¶¶ 16-19.[9] It was not required to do more.

Because Gulf was not obligated under the terms of the Gulf policy to indemnify Phoenix in connection with a settlement agreement which Gulf did not sign, and which Gulf was not given an opportunity to sign, Burr may not recover against Gulf as Phoenix's legal subrogee. It is not necessary to consider the additional arguments made by Gulf.

III. Conclusion

For the foregoing reasons, I recommend that the motion of the defendant, Gulf Insurance, for summary judgment on the plaintiff's claims be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of September, 2003.

[9] Burr's characterization of the January 14, 2002 letter from Phoenix's attorney to Gulf as "invit[ing] Gulf's involvement" in the settlement process, Plaintiff's Responsive SMF ¶ 15, is incorrect. Nothing in that letter may reasonably be so construed. Letter from Vincent R. McCarthy to Karen E. Lyons, Exh. N to Affidavit of Karen E. Lyons, attached to Defendant's SMF.

David M. Cohen
United States Magistrate Judge

Plaintiff

ROCKWELL BURR SIGN & DESIGN INC

represented by **BRADFORD R. BOWMAN**
THOMPSON, BULL, FUREY, BASS & MACCOLL, LLC, P.A.
120 EXCHANGE STREET
P.O. BOX 447
PORTLAND, ME 04112-0447
774-7600
Email: bbowman@thomport.com

EDWARD S. MACCOLL
THOMPSON, BULL, FUREY, BASS & MACCOLL, LLC, P.A.
120 EXCHANGE STREET
P.O. BOX 447
PORTLAND, ME 04112-0447
774-7600
Email: emaccoll@thomport.com

dba
BURR SIGNS

V.

Defendant

GULF INSURANCE CO

represented by **MICHAEL G. TRACY**
BURNS & LEVINSON
125 SUMMER ST.
BOSTON, MA 02110-1624

617-345-3000

PHILIP M. COFFIN, III
LAMBERT, COFFIN
P.O. BOX 15215
477 CONGRESS STREET-14TH FLOOR
PORTLAND, ME 04112-5215
(207) 874-4000